(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NEW YORK STATE DAIRY FOODS, INC., *et al.*,

Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, DANIEL SMITH, COMMISSION EXECUTIVE DIRECTOR, AND CUMBERLAND FARMS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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February 28, 1999

28pp

QUESTIONS PRESENTED

1. Did Congress, by granting conditional approval to the Northeast Interstate Dairy Compact pursuant to the Compact Clause (U.S. Const. art. I, § 10, cl. 3), express its unequivocal consent to the promulgation of regulations that place a substantial burden on commerce between the Compact region and out-of-Compact states in violation of the dormant Commerce Clause (U.S. Const. art. I, § 8, cl. 3)?

2. Did the Court of Appeals and the Dairy Compact Commission err in concluding that milk price pool and rebate devices, which result in competitive disadvantage to partially-regulated plants, are not "compensatory payments" as described in *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), and therefore not within the express trade prohibition imposed by Congress on the Commission?

3. Did the Court of Appeals err in holding that the substantial pecuniary interest of farmer and processor members who participated in Compact Commission decisions did not violate procedural due process requirements because the conflict standard is "substantially" lowered in ratemaking, and attenuated in the members' rate review functions?

LIST OF PARTIES

New York State Dairy Foods, Inc. ("NYSDF") is an incorporated New York not-for profit trade association. It has neither parent companies nor nonwholly owned subsidiaries. Elmhurst Dairy, Inc. is a privately held New York Corporation. It has no parent companies and no nonwholly owned subsidiaries.

For ease of reference, this Petition will use NYSDF as the collective designation for petitioners.

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PETITION FOR WRIT OF CERTIORARI

New York State Dairy Foods, Inc., ("NYSDF") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1999. Review by this Court of the Appeals Court's decision is in order because the Court of Appeals decided important questions of federal Commerce Clause, Compact Clause, and Due Process law in this case that have not been settled by this Court. Also, the Court of Appeals decided a milk trade barrier question in a manner which conflicts with a decision of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit that gave rise to this petition is published as *N. Y. State Dairy v. Northeast Dairy Compact Commission*, 198 F.3d 1 (1st Cir. 1999)(Cumberland Appendix A, attached to the petition of Cumberland Farms,). The Memorandum and Order of the United States District Court for the District of Massachusetts, awarding summary judgment to the defendants is published as *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998) (Cumberland Appendix B). The Final Decision of the Northeast Dairy Compact Commission in *In Re Petitions of Crowley Foods, Inc., Stewart's Processing Corp., Farmland Dairies, Inc. and Cumberland Farms, Inc.*, Docket Nos. HEP-97-001, 002, 004, and 005 (September 23, 1997) is reproduced in Cumberland Appendix C.

JURISDICTION

By this Petition, NYSDF seeks review of the decision of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1999. No party filed a petition for rehearing in this matter following the entry of the First Circuit's opinion. NYSDF invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause") provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 10, cl. 3 (the "Compact Clause") provides: " No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

U.S. Const., Amendments V, and XIV, § 1, (the "Due Process Clause") provide, respectively, that: "No person shall be... deprived of life, liberty or property without due process of law...;" and "No State shall ... deprive any person of life, liberty or property without due process of law...."

Title 7, United States Code, Section 7526 (the conditional consent of Congress, in the 1996 Farm Bill, to the

Northeast Dairy Compact) is fully reproduced in Cumberland Appendix D, and in pertinent part states in Subsection (7): "The Northeast Dairy Compact Commission Shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area of the United States. **** The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose. Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk."

The Northeast Dairy Compact, a statute enacted in each of the New England states, is set forth in section (b) of proposed Senate Joint Resolution 28, 104th Cong. (1995), which is reproduced in Appendix E.

Relevant portions of Title 7, Chapter XIII of the Code of Federal Regulations are reproduced in Appendix F.

STATEMENT OF THE CASE

Since 1937, the United States Secretary of Agriculture has regulated milk prices under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* (the "AMAA"). *Zuber v. Allen*, 396 U.S. 168, 172-79 (1969)(summarizing the history and structure of the federal milk pricing program). "The AMAA authorizes the Secretary of Agriculture to set the minimum prices that 'handlers' (milk processors) must pay to 'producers' (dairy farmers) for raw milk in particular geographic areas." *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 31-32. The Secretary carries out this regulatory authority by issuing Federal Milk Marketing Orders for designated regions of the

country. These orders are regulations which, by economic formula, fix the monthly minimum price of milk in dollars and cents per hundredweight (a measure of weight abbreviated as "cwt" and equal to approximately 11 gallons of milk). Milk prices fixed by the Northeast Dairy Compact Commission are superimposed over federal milk price rules covering most of New England. 7 C.F.R. Part 1001.

Independently of federal regulations, individual states have made persistent efforts to use milk regulation to prop up local farm prices by insulating local markets from out-of-state competition. It has followed that a "large number of [this Court's] Commerce Clause cases arose out of attempts to protect local dairy farmers." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 n.22 (1994).

During the late 1980's and early 1990's, several states sought to fix regulated milk prices at a level over and above federally-established prices fixed under the 7 U.S.C. § 608(c)(18) supply-demand pricing standard. The regulated "over-order" premiums were ordinarily collected from processors with fluid milk sales in the local market, and then re-distributed to in-state dairy farmers based on their milk production. In this way, an impost on the sale of milk within the regulating state helped to subsidize the state's dairy farms without providing similar benefits to out-of-state farmers whose milk was also sold there. The Massachusetts version of this regulatory model was squarely rejected by this Court because it violated the dormant Commerce Clause. *West Lynn, supra; see also, Cumberland Farms, Inc. v. LaFaver*, 33 F.3d 1 (1st Cir. 1994) (following *West Lynn* in rejecting Maine's "impost - subsidy" regulatory scheme); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992) (invalidating New York's version of a milk price impost-subsidy).

Meanwhile, in 1988, Vermont began an effort to form an interstate compact with other Northeast states under the Compact Clause of the United States Constitution (art. I, § 10, cl. 3), in order to extend regional milk price regulation beyond individual state borders. See Milk Industry Foundation v. Glickman, 949 F.Supp. 882, 885 (D.D.C.), aff'd. 132 F.3d 1467 (D.C. Cir. 1997); History of the Compact, www.dairycompact.org/history.htm. By 1995, only the six New England States (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut) subscribed to what became the Northeast Interstate Dairy Compact (the "Compact"). Congress gave conditional consent to the Compact in Section 147 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 7256), the 1996 "Farm Bill."

Under the terms of the Compact, the participating states were to cooperate in the formation of the Northeast Dairy Compact Commission ("Commission"). The Commission membership is comprised of delegations of three to five members, at least one of which must be a dairy farmer, appointed by authorities in each participating state. It is empowered to promulgate milk price regulations for application throughout the Compact region; however, nothing in the Compact itself expressly contemplates the Commission's regulation of milk prices in such a way as to discriminate economically against milk producers or processors located outside the Compact region.

When it approved the Compact, Congress expressed its intent that the Commission's power to regulate interstate commerce between participating and non-participating states was limited. It stipulated that: (a) "[t]he Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States," and (b) "[t]he Compact Commission shall not

use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. §7526(7). "Compensatory payments" refers to a type of discriminatory milk price regulation applied to out-of-region plants which this court, in *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), held is prohibited by Congress, in 7 U.S.C. § 608c(5)(G), for use in the federal milk order program. In what was clearly an effort to preserve the Commission's regulatory authority *within* the Compact region, compatible with U.S.D.A.'s post-*Lehigh* pricing regime, Congress added that "[e]stablishment of a Compact over-order price, *in itself*, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk." *Ibid* (emphasis added).

In 1997, the Commission promulgated a set of regulations establishing an over-order price on milk[1] sold in the Compact region, whether originating outside or inside of the region. *See* 62 Fed. Reg. 23032 (April 28, 1997), and 62 Fed. Reg. 29626 (May 30, 1997). During this period of ratemaking activity, most of the state delegations in the Compact had a majority of members with a substantial financial interest in revenue or rebates from Commission pricing. The five-member Connecticut delegation, during the relevant period, included two dairy farmers, a dairy processor, and a retailer. The five-member Massachusetts delegation, similarly, included two dairy farmers and one milk dealer (processor). *See* Mass. G.L.A. 93A § 24(c). The three-member New Hampshire delegation included one dairy farmer and one dairy processor (who is also a farmer). The Rhode Island and Maine delegations each contained the requisite minimum one dairy farmer. App. C., pp. 57-59;

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[1] For purposes of the regulations at issue here, milk is classified according to its end use. "Class I" milk is milk sold at retail in fluid form. "Class II" and "Class III" milk is milk used to make other dairy products, such as cream, cheese, butter, and yogurt.

www.dairycompact.org/members.htm(Compact Commission Members and Profiles). The five-member Vermont delegation consisted of three dairy farmers, one farmer-processor, and one designated "consumer representative," Robert Starr, the driving force behind the Compact. *Id.*, 1997 Cong. Rec. S. 8620 (July 31, 1997).

The average New England dairy farm in 1997 produced about 3850 pounds of milk per day from 85 cows (Nat. Ag. Stat. Serv., U.S.D.A., *Milk Production*, (Feb. 16, 1999)), and would have reasonably expected to receive about $14,700 per year in Compact revenue at a Compact price of $16.94/cwt, producing projected farm premiums of $1.05/cwt, as estimated and recommended by Gillmeister and adopted by the Commission. 62 Fed. Reg. at 29633. For farms with 200 or more cows, which represent 30% of New England's milk production (*see, Milk Production*, pp. 21-22), the projected annual Compact revenue would have been $34,000.

Under the Commission's regulations, after handlers pay the over-order price into a "pool" (*see* 7 C.F.R. §§ 1304.1(a), 1306.1, 1306.2). The Commission then arranges for the funds to be paid back, through the handlers, to dairy farmers. 7 C.F.R. § 1307.2. How much is paid back per cwt. to each farmer, however, depends on whether the processor that ships the milk for sale within the Compact region is itself located within the region (in which case it is called a "pool plant") or outside the region (in which case it is called a "partially regulated plant"). 7 C.F.R. §§ 1304.5(c)(1), 1307.2(b)(1), 1307.4(f). As applied by the Commission, partially-regulated plants are always assessed a full over-order charge for sales into the Compact region regardless of whether the assessment creates a competitive disadvantage.

Except for the differential distribution of "rebates" to partially regulated (i.e., out-of-region) plants, the Compact pricing scheme operates much like the federal milk order

system. It is the differential rebate which frames the trade barrier (Commerce Clause and compensatory payment) issues in this case.

The District Court described the uncontested discriminatory *effect* of this regulatory construct as follows:

> For July 1997, the Compact over-order Class I price was $16.94, $3.00/cwt above the federal Class I price. Under Compact rules, a New York and a New England plant each having 10 million pounds (100,000 cwts) of receipts from New York Dairy Farmers, with 80% Class I use (80,000 cwts) and equal distribution of packaged milk to New England (40,000 cwts) and New York (40,000 cwts) during the month of July, would have identical over-order obligations of $120,000 to the Compact pool for packaged milk distributed in New England. . . .
>
> The Commission would disburse from the pool to dairy farmers through the handlers, acting in a conduit capacity. The Commission calculated an "over-order producer price" (i.e., the amount to be paid back to the dairy farmers) of $1.28/cwt for July 1997. Whereas the New England pool plant would receive payment from the pool of $128,000 for redistribution to producers . . . the partially regulated New York plant would receive only $51,200 for redistribution . . . on some milk receipts . . . thus placing the New York handler at a $76,800 competitive disadvantage.

New York State Dairy Foods, Inc., 26 F. Supp. 2d at 256-57 (internal citations and footnotes omitted).

Because of its negative impact on the competitive position of partially regulated plants, NYSDF and individual "partially-regulated" plants challenged the Commission's

over-order price and its related rebate formula as a violation of the dormant Commerce Clause and of the trade barrier proscription in Congress' conditional consent to the Compact, and they also challenged self-interested participation by New England farmers and processors in the pricing activities as a violation of procedural due process.

In the first instance, the processors filed an action in the United States District Court for the District of Massachusetts seeking preliminary and permanent injunctive relief. Shortly after filing their District Court action, some plaintiffs in that case also sought to exhaust agency remedies by asking the Commission review the lawfulness of claimed trade barriers and self-interest. *See* 7 C.F.R. § 1381.4.

In September, 1997, the Commission issued its final decisions, rejecting all challenges to the Commission's regulatory scheme. The Commission expressly disavowed the applicability of *any* federal or state Administrative Procedure Act requirements to its review functions, because the Commission chose not to apply them (App. 94), and rejected plaintiffs' several requests for the Commission to remove its decision-makers from influence by interested members and employees. App. 97-98. The plaintiffs in the District Court action then amended their complaints to add direct challenges to the regulations and the Commission's decision.[2] On cross-motions for summary judgment, the District Court rejected all of the plaintiffs' challenges.

From the judgment of the District Court, there followed a timely appeal to the United States Court of Appeals for the First Circuit. In its November 30, 1999 opinion, that Court also rejected all challenges. NYSDF now seeks review of that opinion by this Court.

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[2] The basis for federal jurisdiction in the United States District Court for the District of Massachusetts was 28 U.S.C. §§ 1331, 1337 and 1343(a)(3), and 7 U.S.C. § 7256.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS TO UPHOLD TRADE BARRIERS BETWEEN COMPACT STATES AND NON-PARTICIPATING STATES, WITHOUT FINDING UNAMBIGUOUS CLARITY IN CONGRESSIONAL CONSENT AS REQUIRED FOR COMMERCE CLAUSE PURPOSES, RAISES IMPORTANT QUESTIONS OF COMMERCE CLAUSE AND COMPACT CLAUSE CONFLICT THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In its decision below, the Court of Appeals considered congressional consent both to the establishment of the Northeast Interstate Dairy Compact and to the Compact's regulation of interstate commerce. The Compact Clause and the Commerce Clause address separate sets of important considerations underlying the constitutional allocation of powers between the federal government and the several states, and each demands attention to a separate set of details.

The Compact Clause requires congressional consent to interstate ventures "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 468 (1978) (*quoting Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)).

The standard for establishing congressional consent to an interstate compact is relatively undemanding, and may be inferred. *See State of Virginia v. State of West Virginia*, 78 U.S. 39, 59-60 (1870)(consent of Congress to an agreement between states may be given otherwise than in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto).

Congress's consent must be expressly stated or unmistakably clear and unambiguous before a federal statute will be read to permit or to approve what would otherwise be a violation of the dormant Commerce Clause. *See Sporhase*, 458 US at 960; *South-Central*, 467 US at 91; *Wyoming v. Oklahoma*, 502 US 437, 458 (1992). "A rule requiring a clear expression of approval by Congress . . . reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central*, 467 US at 92.

Many interstate compacts that require congressional consent (including the Northeast Interstate Dairy Compact) involve regulation of commerce *among the states participating in the compact.* Congressional consent to the compact cannot be deemed sufficient to extend commerce restricting regulation to non-participants unless Congress has affirmatively contemplated and unequivocally approved the extraterritorial reach of an otherwise invalid regulation. This is the necessary implication of long-established precepts of Compact Clause / Commerce Clause jurisprudence.

> [O]nly congress is the appropriate organ for determining what arrangements between states might fall within the prohibited class of 'treaty, alliance, or confederation', and what arrangements come within the permissive class of 'agreement or compact.' *But even the permissive agreements may affect the interests of states other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.*

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution-A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1925) (emphasis added).

While Congress *did* grant the New England States conditional authority to enter the Compact, it *did not* consent unequivocally to the *extraterritorial* burden on interstate commerce subsequently created by the Compact regulations.

In analyzing the intent of Congress with respect to the Commission's regulation of interstate commerce, the Court of Appeals said:

> Congress's command that "[t]he Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose" is not all Congress had to say on the matter. The next sentence states: "Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk." 7 U.S.C. § 7256(7). The Commission rightly urges that these two sentences read together mean that the Commission may do virtually anything (within the contemplation of the Compact) with respect to over-order pricing, short of compensatory payments.

Crowley Foods, Inc., 198 F.3d at 10. The Court of Appeals omitted from its analysis an additional relevant condition attached to congressional approval of the Compact. Congress also said "The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7).

In sustaining the validity of the Commission's regulatory actions, the Court of Appeals decided that although Congress had not "explicitly" approved the regime adopted by the Commission, it "chose to prohibit one action and allow all others." 198 F. 3d. at 11. The court inferred that Congress consented to whatever discriminatory regulation of interstate trade it had not expressly prohibited, rather than that the Commerce Clause prohibited every discriminatory regulation of interstate trade Congress did not expressly permit. That logical construct turns the relevant Commerce Clause decisions of this Court upside down.

The meaning and effect of the "consent" of Congress where the Compact Clause overlaps the dormant Commerce Clause is a question that implicates some of the most fundamental elements of the federal system of government, yet has not been addressed squarely by this Court. Because this Court has not spoken on this important question of federal law, review of this case on writ of certiorari is in order.

II THE APPELLATE COURT'S AGREEMENT WITH THE COMMISSION THAT, NOTWITHSTANDING COMPETITIVE DISADVANTAGE, A DEVISE FOR "PRICING AND POOLING" OF MILK SOLD BY PARTIALLY-REGULATED PLANTS IS DISTINGUISHED FROM AND CANNOT CONSTITUTE A "COMPENSATORY PAYMENT," IS IN CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *SANI-DAIRY v. ESPY*, APPLYING THIS COURT'S OPINION IN *LEHIGH VALLEY COOP v. UNITED STATES.*

Once the Court of Appeals concluded that "the Commission may do virtually anything (within the contemplation of the Compact) with respect to over-order

pricing, short of compensatory payments," its focus shifted away from the issue of congressional consent to whether the Commission's regulatory scheme established a "compensatory payment." *Crowley Foods, Inc.*, 198 F.3d at 10. The Court concluded that the Commission's over-order price regulations were not a compensatory payment system, because "under a compensatory payment system, the partially regulated plants would receive *no disbursements whatsoever* from the pool." *Ibid* (emphasis added). Since the partially-regulated (out-of-region) plants get at least *some* disbursement from the pool under the Commission's regulations, the appeals court reasoned, the over-order price payments mandated by the Commission did not meet "compensatory payment" definition, and therefore were not expressly prohibited (*i.e.*, were permitted) by Congress. *Ibid.*

Further deferring to the Commission's interpretation of the regulatory concept of "compensatory payment," the Court emphasized as an underlying regulatory distinction "compensatory payments" on one hand and "pricing and pooling" on the other. *Id.*, at 11. The Commission's review decision had presaged this result as follows (App. 77-78):

> The express inclusion of the one pricing mechanism of compensatory payments under §10(6), along with another, distinct, mechanism of "pricing and pooling of milk" immediately following under §10(7), establishes that the Compact as originally conceived contained *two* separate means to regulate milk brought into the regulated area from beyond the area. The phrasing of the second mechanism, premised upon the "pooling" of milk, establishes the critical distinction.

This aspect of the decision by the Court of Appeals serves further to highlight that court's deviation from the

relevant decisions of this Court. Federal judicial and administrative treatment of "compensatory payments," prohibited to the Secretary of Agriculture in the federal milk order program, where the Commerce Clause plays no limiting role, reveals a far more practical approach to substance over form.

By 1994, when Congress first considered a bill to grant consent to the Compact, the term "compensatory payment," as used in the limiting conditions of § 147(7) of the 1996 Farm Bill, had a clearly understood meaning with legal, historical and factual significance. Following this Court's opinion in *Lehigh Valley Co-op. v. United States*, 370 U.S. 76 (1962), it was a reference to any form of provision of a federal milk marketing order which imposed financial obligations upon "partially regulated" plants for the sale of milk within the regulated area. Prohibited compensatory payments are those which bear "'no relation to the actual cost of milk'" or to whether an actual advantage or disadvantage existed. *Sani-Dairy v. Espy*, 939 F. Supp. 410, 415 (W.D. Pa.), *aff'd* 91 F. 3d 15 (3rd Cir. 1996). Applying *Lehigh Valley* as barring compensatory payments which operate in substance to create trade barriers to partially-regulated plants, the Sani-Dairy court had no difficulty invalidating a New York federal market scheme even though Sani-Dairy was "pooled" on the limited sales it made into the federal market.

Congress did not, in Condition 7 of the Congressional consent, distinguish between permissible and impermissible compensatory payments. All compensatory payments were precluded by Congress for Compact Commission use. The First Circuit's unique conclusion that "pooled" milk sold by a partially regulated plant can't suffer from compensatory payment infirmity, however, has policy consequences beyond non-participating states' trade into the compact region. Since "compensatory payment" defines what the Secretary may or may not do in federally-regulated markets from coast to

coast, the First Circuit decision would create an opportunity for USDA to reestablish the form of barrier which only the Third Circuit has found to be objectionable in substance. This Court should, therefore, act decisively to resolve this conflict between circuits.

III WHETHER FINANCIAL SELF-INTEREST OF FARMERS AND PROCESSORS WHO SIT ON THE COMMISSION CONFLICTS WITH DUE PROCESS NOTIONS OF FAIRNESS IN ADMINISTRATIVE RATEMAKING DECISIONS IS A QUESTION ON WHICH HIGH COURTS OF SEVERAL STATES ARE IN CONFLICT, AND WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Pecuniary interest by adjudicators has been held to be disqualifying in judicial as well as administrative contexts. In *Gibson v. Berryhill*, 411 U.S. 546, 578-579 (1973), the Court held that the Alabama State Board of Optometry could not constitutionally conduct hearings addressing the potential revocation of the licenses of other optometrists because "success in the Board's efforts would possibly redound to the personal benefit of members of the Board" (411 U.S. at 78).

Due process ordinarily requires that a decision by an administrative agency, as well as by a court, be rendered by a tribunal which is impartial in fact and appearance. A historical summary of this cherished proposition, from ancient Rome to debate on the U.S. Constitution, was described by Justice Ginsberg in *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417 (1995):

Application of this principle to ratemaking, or other administrative actions sometimes considered to be quasi-legislative in nature, is less clear. Whether labeled quasi-

judicial or quasi-legislative,[3] this Court instructed 62 years ago that the process of fixing minimum rates requires procedures "consistent with the essentials of a fair trial." *Railroad Commission v. Pacific Gas & Electric*, 302 U.S. 388, 393-94 (1938). Some state courts hold similar views. *Northwestern Bell Tel. v. Stofferahn*, 461 N.W.2d, 129, 133 (S.D. 1990)(neutrality is required in ratemaking).

In *Johnson v. Michigan Milk Marketing Board*, 295 N.W. 346 (Mich. 1940), the plaintiff, a Detroit milk distributor, claimed that the make-up of the five-member board, including two dairy farmers and one milk distributor, precluded a fair hearing required by due process. The Court agreed:

> No claim is made that any member of the present Board has acted unfairly or arbitrarily, but the fact remains that the act requires the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them.
>
> * * * * * *
>
> The Board, as constituted under the statute, is of such nature that Johnson was not, and could not have been, accorded that impartial hearing which satisfies the requirements of due process.

295 N.W. at 351, 353. *Accord, State Board of Dry Cleaners v. Thrif-D-Lux Cleaners*, 254 P.2d 29, 36 (Cal. 1953)(voiding minimum price law in part based on financial self-interest of board members); *New Hampshire Milk Dealers Association*

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[3]The distinction between rulemaking and adjudication is sometimes unclear and frequently overlapping. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 770-73 (1969)(Black, J., concurring). Kenneth C. Davis, in his *Administrative Law Treatise*, § 7.2 (2d. Ed. 1979), has drawn the line at the difference between making policy (legislative) and resolving factual disputes in the application of policy (adjudicative).

v. New Hampshire Milk Control Board, 222 A.2d 194 (N.H. 1966)(expressing "no doubt," that "members of the Milk Control Board" were constrained by state Constitutional limitations on financial self-interest).

The Supreme Court of Virginia took the opposite view, reasoning that the right of appeal to a court satisfied due process concerns. *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35, 38 (Va. 1950), and the Nebraska Court has reasoned similarly in a case involving a state auto franchise. *Chrysler Motor Corp v. Lee Janssen Motors*, 534 N.W.2d 309 (Neb. 1995).

Questions of conflict of interest in rate cases are sometimes resolved by statute, avoiding the need for Constitutional analysis. Federal milk price rulemaking, for example, requires a hearing before an administrative law judge who has no "pecuniary interest in the outcome," 7 C.F.R. § 900.6(a). Further, persons having any interest in the proceeding are barred from ex parte contact with officials who may be involved in the decision-making process. 7 C.F.R. § 900.16. This is also illustrated under state law. Members of the Maine Milk Commission may not have any professional or financial interest in any milk producer, dealer, or retailer, 7 Maine RSA § 2952, and members of the New Hampshire Public Service Commission may not have any financial, representative or professional interest in a regulated utility. N.H. RSA Ch. 363.

However, as the Compact Commission appears to have correctly concluded, it is not a federal agency subject to the APA, nor a state agency subject to state procedures. App. 94; See Laurence H. Tribe, American Constitutional Law (3rd Ed, Vol.1, 1999), Ch. 6 (Union-Preserving Aspects of Federalism), pp. 1241-42: "Such a commission should presumably be treated as a hybrid – a compact agency belonging to neither level of our federal-state hierarchy."

The Court of Appeals, in an apparent test of the degree to which *Pacific Gas & Electric* principles still apply, opined that "the Due Process Clause sets a significantly lower bar" for this type of case (quasi-legislative) than for adjudication (198 F.3d at 13), and that any taint from farmers'/processor's vote on the hearing panel review of agency rules was attenuated – exactly how is somewhat unclear – and cleansed by the disinterest of the panel which ruled against plaintiffs. Id., at. 15.

To clarify how low the due process bar may now be to financial interest in ratemaking proceedings, to provide guidance on due process standards applicable to "hybrid" compact entities, and to promote better consistency in state court due process decisions, this Court should undertake certiorari review on the third issue raised by NYSDF also.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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